84-1846

Case No. ____

Office-Supreme Court, U.S.
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ALEXANDER L. STEVAS,
CLERK

In the

Supreme Court of the United States

October Term, 1984

Nancy Sue Thomas & Harold Lee Thomas, *Petitioners*

V.

State of Arkansas, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE ARKANSAS COURT OF APPEALS

BYRON S. SOUTHERN
Attorney at Law
P.O. Box 404
319 West Second Street
Little Rock, Arkansas 72203
(501) 374-4868

Attorney for Petitioners,
Nancy Sue Thomas and
Harold Lee Thomas

23pp

QUESTIONS PRESENTED

Whether Rule 37.1 of the Ark. R. Crim. P., which requires that a prisoner be in custody in order to have the right to file a Motion for a New Trial or to have his original sentence modified on the ground that the sentence was imposed in violation of the constitution and laws of the United States, is in violation of the Due Process Clause of the U.S. Const. Amend. XIV.

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PETITION FOR A WRIT OF CERTIORARI TO THE ARKANSAS COURT OF APPEALS

OPINIONS BELOW

The decision of the Arkansas Court of Appeals, not designated for publication, denying the Petitioners, Nancy Sue Thomas and Harold Lee Thomas, reversal of their convictions at trial for the reason that the trial court had denied a Motion for Continuance filed by Petitioners' prior attorneys due to the fact that Petitioners' prior attorneys had failed to comply with the Affidavit requirements of Ark. Stat. Ann., §27-1403. The opinion of the Arkansas Court of Appeals is appended hereto.

JURISDICTION

The opinion of the Arkansas Court of Appeals was entered on February 20, 1985, a timely application for an extension of time to file this Petition for Writ of Certiorari was filed on April 17, 1985, by Petitioners. Petitioners application for an extension of time was granted by the

Supreme Court of the United States on April 19, 1985. The Order of the Supreme Court stated that the time for filing this Petition for a Writ of Certiorari was extended to and included May 21, 1985. Petitioners' application for extension of time and the Court's Order extending the time are appended hereto. This Court's jurisdiction is invoked under 28 U.S.C., §1257 (3).

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

1. United States Constitution, Amendment 6:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and District wherein the crimes have been committed, which District shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

2. United States Constitution, Amendment 14, Section 1:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

3. Rule 37.1 Arkansas Rules of Criminal Procedure:

"Scope of Remedy.

A prisoner, in custody under sentence of a Circuit Court and whose case was not appealed to the Supreme Court, claiming a right to be released, or to have a new trial, or to have the original sentence modified on the ground:

(a) That the sentence was imposed in violation of the constitution and laws of the United States or this State; or

(b) That the Court imposing the sentence was without jurisdiction to do so; or

(c) That the sentence was in excess of the maximum authorized by law; or

(d) That the sentence is otherwise subject to collateral attack; may file a verified motion at any time in the Court which imposed the sentence, praying that the sentence be vacated or corrected.

STATEMENT OF THE CASE

Petitioners, Harold and Nancy Sue Thomas, were convicted in a jury trial of delivery of a controlled substance in violation of Arkansas law. Each was sentenced to nine years imprisonment and fined $9,000.00. Petitioners argued two points for reversal to the Arkansas Court of Appeals. The first point argued by Petitioners to the Appellate Court was that the evidence established that they were entrapped. That argument is not pertinent to this Petition for a Writ of Certiorari.

The Petitioners' second argument to the Appellate Court was that the trial court erred in refusing to grant their Motion for a Continuance to secure the attendance of a witness at Petitioners' trial. The Arkansas Court of Appeals sustained the verdict against Petitioners and stated that Petitioners' attorneys at trial had failed to comply with the requirements of Ark. Stat. Ann., §27-1403, which requires, in substance, that a Motion to postpone a trial on account of the absence of evidence shall be made upon affidavit showing the materiality of the missing evidence expected to be obtained, that diligence has been used to obtain it; and if it be for an absent witness, the affidavit must show what facts the affiant believes a witness will prove. Petitioners' trial lawyers failed to make the required affidavit and the Court of Appeals to the State of Arkansas ruled that denial of the Motion for Continuance was not an abuse of discretion due to the fact that Petitioners' attorneys had not complied with the statute requiring the affidavit in that they did not proffer the expected testimony of Petitioners' missing witness in compliance with Ark. Stat. Ann., §27-1403.

Rule 37.1, Ark. R. Crim. P., now precludes Petitioners from filing a Motion for new trial based on the theory of ineffective assistance of counsel pursuant to United States Constitution, Amendment 6, and *Moore v. United States*, 432 Fed.2d 730 (3d Circ. 1970); *Hawkman v. Parratt*, 661 F.2d 1161 (1981).

Petitioners are now free on bond pending their pursuit of this Writ of Certiorari for this Court to determine the constitutionality of Rule 37.1(a) of the Ark. R. Crim. P., which requires that they be incarcerated before they are permitted to assert their rights under the constitution and laws of the United States.

This precise federal question was not raised prior to Petitioners' application for a Writ of Certiorari from this Court due to the fact that Petitioners' prior counsel would have had to admit their own incompetence in order to assert this issue. For this reason, Petitioners state that their failure to raise this issue previously is excusable.

And, there are compelling and important reasons for this Court's grant of a Writ of Certiorari due to the fact that Ark. R. Crim. P., Rule 37.1 (a) seriously circumscribes Petitioners' right to a new trial or a modification of their sentence due to violations of their constitutional rights and the laws of the United States due to the fact that Petitioners are required to be in prison to assert those rights. Petitioners emphatically state that such a requirement is a violation of the due process clause of the United States Constitution, 14th Amendment. *Rice v. Sioux City Memorial Park Cemetery*, Iowa 1955, 17 S. Crt. 614, 349 U.S. 70, 99 L.Ed. 897. *In re Murchison*, Michigan 1955, 75 S. Crt. 623, 349 U.S. 143, 99 L.Ed. 942.

REASONS FOR GRANTING THE WRIT

The State of Arkansas denies constitutional due process to those Defendants convicted and free on appeal bond by not allowing them to pursue their constitutional rights unless they are imprisoned. Other States with similar statutes or rules of criminal procedure have held correctly, as opposed to the State of Arkansas, that the words "in custody" as used in the type of rule in effect in Arkansas means any possibility of restraint on liberty. *State v. McCraw*, 551 S.W.2d 692 (1977), construing Tennessee Code Annotated, §40-3802. The State of Illinois in *People v. Martin-Trigona*, 472 N.E.2d 508 (Ill. App., 1st Dist. 1984) has ruled that the words "imprisoned in the penitentiary" apply to a defendant who is free on appeal bond in order that the defendant could pursue post-conviction relief.

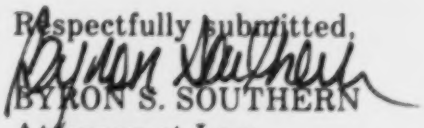
As long ago as 1935, this Court, in the case of *Mooney v. Holohan*, 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791, stated that the doctrine of exhaustion of State remedies assumes that some adequate state remedy exists for which those convicted may raise claims of denial of federal rights. In this case, the Petitioners pray for the issuance of a Writ of Certiorari from this Court because of the total absence in the State of Arkansas, of any remedy which can be sought by a convicted defendant who is free on appeal bond.

The Court of Appeals of Arkansas has stated that the pole star of procedural due process is the opportunity to be heard and is an essential requisite of due process of law and judicial proceedings. *Aetna Cas. & Sur. Co. v. Dyer*, 6 Ark. App. 211, 639 S.W.2d 536 (1982). However, Rule 37.1 of the Ark. R. Crim. P. denies this right to those convicted, but released on appeal bond.

CONCLUSION

For the reason stated herein, a Writ of Certiorari should issue to review whether Rule 37.1 of the Ark. R. Crim. P. is denying the Petitioners herein due process of law under the United States Constitution, Amendment 14.

Respectfully submitted,



BYRON S. SOUTHERN
Attorney at Law
P.O. Box 404
319 West Second Street
Little Rock, Arkansas 72203
(501) 374-4868

Attorney for Petitioners,
Nancy Sue Thomas and
Harold Lee Thomas

CERTIFICATE OF SERVICE

I, Byron S. Southern, do hereby certify that a copy of the above and foregoing Petiton was mailed on the 21st day of May, 1985 to The Honorable Gerald Brown, Circuit Judge, Greene County Courthouse, Paragould, Arkansas and Ms. Dona Williams, Clerk, Arkansas Court of Appeals, Justice Building, State Capitol Grounds, Little Rock, Arkansas 72201.

Byron Southern

BYRON S. SOUTHERN

APPENDIX

DIVISION II
ARKANSAS COURT OF APPEALS
Opinion Delivered February 20, 1985

No. CA CR. 84-130

Nancy Sue Thomas and Harold Lee Thomas	Appellants	Appeal from Poinsett Circuit Court
V.		
State of Arkansas	Appellee	Honorable Gerald Brown, Judge
		Affirmed

MELVIN MAYFIELD, Judge

Harold and Nancy Sue Thomas were convicted in a jury trial of delivery of a controlled substance in violation of Ark. Stat. Ann. § 82-2617 (Repl. 1976). Each was sentenced to nine years imprisonment and fined $9,000. They argue two points for reversal.

The appellants' first point is that the evidence established that they were entrapped and, therefore, their convictions should be reversed. Ark. Stat. Ann. §41-209 (Repl. 1977) defines entrapment as follows:

> Entrapment occurs when a law enforcement officer or any person acting in cooperation with him, induces the commission of an offense by using persuasion or other means likely to cause normally law-abiding persons to commit the offense. Conduct merely affording a person an opportunity to commit an offense does not constitute entrapment.

In order to determine whether or not the affirmative defense of entrapament was established by the appellants in the instant case, it is necessary for us to examine the rather involved fact situation.

The appellants lived in Bartlesville, Oklahoma, and owned a night club where Sandra Heigel worked for them in January of 1982. Sandra left in February but later returned and stayed with appellants for some time. In October, she was told by Nancy Sue Thomas that she had some marijuana and that Sandra could make some money on it if Sandra knew anyone who might buy it. In late December, Sandra met Butch Vandyke on a bus in Arkansas. Butch told her that he knew some people who wanted to buy a large quantity of marijuana and Sandra told him she had access to a large quantity. They exchanged telephone numbers, Sandra giving Butch her mother's number in Batesville, Arkansas, and she testified that she called him once early in January of 1983.

Butch and his wife Jenny lived in Trumann, Arkansas. Jenny believed that her suspended sentence on a robbery conviction was about to be revoked because of a forgery charge against her, so she and Butch contacted the Trumann police department late in December of 1982 and offered to help with some drug cases. The police told them that no deals could be made but they would talk with the prosecuting attorney in Jenny's behalf.

Butch later called the chief of police of Trumann and told him that he could purchase approximately one hundred pounds of marijuana whereupon the chief put Butch in contact with James Rainbolt, an undercover narcotics investigator with the Arkansas State Police. Butch gave him Sandra's name and her telephone number in Batesville. Rainbolt, posing as an agent for some unknown buyers, contacted Sandra several times by telephone to set up the purchase. They discussed prices and quantity but Sandra finally told Rainbolt that she could not go to Oklahoma and pick

up the marijuana because she did not have a car or money. Rainbolt told her he would get her a car but that Butch would have to go with her.

Sandra then called Bartlesville and made arrangements with Mark Thomas, the appellants' son, to pick up the marijuana, but when they arrived there early on the morning of January 8, Mark was reluctant to give the marijuana to Sandra without receiving the money. At this point, appellant Nancy Sue Thomas stated that the marijuana belonged to her and that she would go with Sandra and Butch to Trumann where the exchange was to take place. Mrs. Thomas testified that she was willing to do this for the money involved and to help Sandra who thought her life endangered because Butch had said he was with the Mafia. Appellant Harold Thomas did not want his wife to go but she insisted and Harold finally agreed to go also but testified that he did so only to humor his wife who had been emotionally disturbed ever since a son of theirs had died five years earlier.

The marijuana was loaded into Butch and Sandra's car and the appellants followed in their car. They stopped at a restaurant when they arrived in Trumann and met Rainbolt there. Arrangements were made for the exchange to take place at a nearby parking lot. Butch and Sandra went there at which time Sandra was arrested. The appellants were then arrested at the restaurant.

Based on the foregoing, appellants argue that they were entrapped because the police did more than "afford an opportunity" to them to commit a crime. They cite *Sherman v. United States*, 356 U.S. 369 (1958), to support their argument. In *Sherman*, a government informer met the defendant at a doctor's office where both apparently were being treated for narcotics addiction. The informer said he was not responding to treatment and asked the defendant if he knew a good source of narcotics. After repeated requests, the defendant responded by getting the informer a source

and then was induced to return to the habit himself. The Court held that it was patently clear that the informer induced the defendant's commission of the crime and held that, based on the undisputed testimony of the government's witness, the defense of entrapment was established as a matter of law. However, quoting from *Sorrells v. United States*, 287 U.S. 435 (1932), the Court explained that entrapment occurs only when the criminal conduct was "the product of the *creative* activity" of law enforcement officials. (Emphasis supplied by the Court in *Sherman.*)

In addition, the Court in *Sherman* recognized that the criminal predisposition of the accused is relevant to the decision of whether or not entrapment has occurred. The Court emphasized that there was no evidence that the defendant in that case was ready and willing to sell narcotics. Instead, the evidence established that despite the efforts of the informer, the defendant first refused, and then remained hesitant for some time about helping the informer. We have restated the principles relied on in the *Sherman* decision in *Harper v. State*, 7 Ark. App. 28, 643 S.W.2d 585 (1982), where we said that the defendant's conduct and predisposition is material and relevant in determining whether entrapment has occurred. In that case, we also stated that entrapment must be proven by a preponderance of the evidence and can only be found as a matter of law if no factual issues need resolving.

In the instant case, appellant Nancy Sue Thomas first expressed to Sandra Heigel an interest in finding someone to purchase the marijuana. This was several months before the police became involved in the case. Sandra told Butch Vandyke at their first meeting that she had access to marijuana. Sandra also made the first call to Butch to set up the deal. Although she later expressed hesitancy about the sale, she also stated that it was due to a lack of money and a car to get to Oklahoma. When those items were supplied, she readily agreed to pick up the marijuana. In Oklahoma, Mrs.

Thomas volunteered to go to Arkansas with Sandra to deliver the marijuana. Although appellant Harold Thomas was more hesitant, he also agreed to go to Arkansas, apparently to humor his emotionally disturbed wife. Entrapment is an affirmative defense. *Spears v. State*, 264 Ark. 83, 568 S.W.2d 492 (1978); *Harper v. State*, *supra*. The jury was instructed that if this defense was established by either defendant that defendant should be found not guilty. We think this was an issue of fact properly submitted to the jury and that its verdict is supported by substantial evidence.

The appellants' second argument is that the court erred in refusing to grant their motion for a continuance to secure the attendance of Butch Vandyke at the trial. On December 6, 1983, the trial court held a pretrial hearing on that motion. At the hearing, Jenny Vandyke testified that she had not seen or heard from her husband since July of 1983 and that she did not know where he was. She also testified that he might return at Christmas to see their children but that he might just sneak in and out since he was in trouble with the law. The state's efforts to locate Butch had been unsuccessful. The appellants concede that the grant of a continuance is discretionary, *Walls v. State*, 280 Ark. 291, 658 S.W.2d 362 (1983), but they argue that here, the trial court's action was an abuse of its discretion which denied them their constitutional right to compel the attendance of witnesses against them. The appellants assert that their request was reasonable because of the evidence that Butch was likely to appear at Christmas which was only 19 days away. The appellants also contend that they exercised due diligence in attempting to locate him, and that his testimony was essential to establish their defense of entrapment.

In *Kelley v. State*, 261 Ark. 31, 545 S.W.2d 919 (1977), the Arkansas Supreme Court listed four significant factors which are to be considered in the trial court's exercise of discretion in the matter of a continuance to procure the at-

tendance of a witness. they are: (1) diligence of the movant in securing the attendance of the witness, (2) the probable effect of the testimony of the witness at the trial, (3) the lieklihood of procuring the attendance of the witness in the event of a postponement, and (4) the filing of an affidavit, stating not only what facts the witness would prove, but that the appellant believes them to be true, as required by Ark. Stat. Ann. § 27-1403 (Repl. 1979). That statute provides:

> A motion to postpone a trial on account of the absence of evidence shall, if required by the opposite party, be made only upon affidavit showing the materiality of the evidence expected to be obtained, and that due diligence has been used to obtain it; *and if it be for an absent witness, the affidavit must show what facts the affiant believes the witness will prove*, and not merely the effect of such facts in evidence, that the affiant himself believes them to be true, and that the witness is not absent by the consent, connivance, or procurement of the party asking the postponement. (Emphasis added.)

This statute is of course void if it denies a person the use of process to bring witnesses before the court in criminal persecutions. *Graham v. State*, 50 Ark. 161, 6 S.W. 721 (1887). However, the statute has been cited in several criminal cases as being relevant to a trial court's decision on a motion for continuance. For instance, the court in *Kelley* held that the denial of a motion which is not in substantial compliance with the statute is not an abuse of discretion. *Accord, Venable v. State*, 260 Ark. 201, 538 S.W.2d 286 (1976). *See also*, Ark. Stat. Ann. § 43-1706 (Repl. 1977).

In the instant case, the appellants did not proffer the expected testimony of Butch Vandyke in compliance with Ark. Stat. Ann. § 27-1403. Under all the circumstances, we cannot say that the trial court abused its discretion when it denied the appellants' motion for a continuance.

Affirmed.

Cooper and Glaze, JJ., agree.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

No. _____

NANCY SUE THOMAS and
HAROLD LEE THOMAS, Petitioners,

v.

STATE OF ARKANSAS, Respondent

APPLICATION FOR EXTENSION OF TIME
TO FILE PETITION FOR WRIT OF CERTIORARI

TO MR. JUSTICE BLACKMUN, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Eighth Circuit:

Pursuant to Title 28, United States Code, §2101 (c) and Rule 22, Rules of the Supreme Court of the United States, application is hereby made for an extension of time within which to file a Petition for a Writ of Certiorari from April 22, 1985, to and including May 22, 1985.

1. The Judgment sought to be reviewed is that of the Arkansas Court of Appeals in the case entitled: *Nancy Sue Thomas and Harold Lee Thomas, Appellants v. State of Arkansas,* Appellee, No. CA CR. 84-130.

2. The Judgment sought to be reviewed was entered on February 20, 1985.

3. The Judgment of the Arkansas Court of Appeals, to wit, CA CR. 84-130, such Opinion being delivered February 20, 1985, a copy of which is attached hereto (not designated for publication), affirmed the lower court's decision wherein Defendants were convicted of delivery of a controlled substance in violation of Ark. Stat. Ann. §82-2617 (Repl. 1976).

The time allowed by law for filing a Petition for a Writ of Certiorari will expire on April 20, 1985.

4. The jurisdiction of this Court is invoked under the provisions of Title 28, United States Code, §1257 (3).

5. This case involves the 5th, 6th, and 14th Amendments of the Constitution of the United States. Defendants assert and allege that the lower court erred in failing to grant a continuance to enable Defendants to produce testimony of Butch Vandyke; that such witness was vital to the case of Defendants and their defense of entrapment; that the denial of the Motion of Defendant for Continuance by the lower court constituted a denial of due process in violation of the 5th and 14th Amendments and resulted in the failure of Defendants being confronted with (one of) the witnesses against them in violation of the 6th Amendment.

6. This extension is requested because Petitioners herein, applicants for an extension of time, are unable to timely file their Petition for Writ of Certiorari for the following reasons:

a. Defendants have changed counsel and engaged Byron S. Southern as new counsel on April 9, 1985, and said new counsel needs an extension-enlargement of time in order to properly prepare Defendants' Petition.

7. Defendants' Petition for Writ of Certiorari being due on April 22, 1985, Defendants respectfully request an immediate ruling on this application for an extension of time.

WHEREFORE, it is respectfully requested that the time within which to Petition for a Writ of Certiorari be extended to and including May 22, 1985.

DATE: April 17, 1985

SOUTHERN, ALLEN, EAST,
JAMES & JONES
Attorneys at Law
P.O. Box 404
Little Rock, AR 72203

BY: /s/ Byron S. Southern
BYRON S. SOUTHERN
(501) 374-4868

CERTIFICATE OF SERVICE

I, Byron S. Southern, do hereby certify that a copy of the above and foregoing Petition for Extension of Time, was mailed this 17th day of April, 1985, to Honorable Gerald Brown, Circuit Judge, Greene County Courthouse, Paragould, Arkansas, and to Ms. Donna Williams, Arkansas Court of Appeals Clerk, Justice Building, State Capitol Grounds, Little Rock, AR 72201.

/s/ Byron S. Southern
BYRON S. SOUTHERN

SUPREME COURT OF THE UNITED STATES

No. A-795

NANCY SUE THOMAS AND HAROLD LEE THOMAS,
Applicants,

V.

ARKANSAS

ORDER EXTENDING TIME TO FILE
PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including 21 May, 1985.

/s/ Harry A. Blackmun
Associate Justice of the Supreme
Court of the United States

Dated this 19th
day of April, 1985.